

United States District Court
Southern District of New York

UNITED STATES OF AMERICA

- against -

09 Cr. 965 (JGK)

SHIVA SHARMA,

MEMORANDUM OPINION AND
ORDER

Defendant.

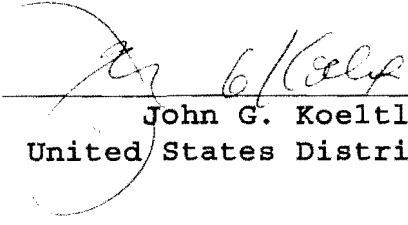
JOHN G. KOELTL, District Judge:

The Court has considered the parties' submissions and determined that an evidentiary hearing will be necessary. In considering whether the entry of an order of removal "was fundamentally unfair" for purposes of 8 U.S.C. § 1326(d), the Court must determine whether it "resulted in a deportation that might not otherwise have occurred." United States v. Fernandez-Antonia, 278 F.3d 150, 159 (2d Cir. 2002). That inquiry requires a defendant to "show that, absent the procedural errors, he would not have been removed," id., not merely that the proceedings that actually occurred would not have resulted in his removal. See also United States v. Copeland, 376 F.3d 61, 73-74 (2d Cir. 2004) ("Resolution of the prejudice issue in the Section 1326(d)(3) context is somewhat akin to a trial within a trial. The district court must determine whether there is a reasonable probability that the alien would have obtained relief").

The hearing shall be held on the previously scheduled date
of December 10, 2010, at 10:00 a.m.

SO ORDERED.

Dated: New York, New York
November 23, 2010



John G. Koeltl
United States District Judge